

STATE OF MICHIGAN
IN THE SUPREME COURT

SHERRY COMBEN, TREASURER FOR THE
COUNTY OF ANTRIM,

Plaintiff-Respondent,

v

THE STATE OF MICHIGAN, JAY B. RISING, in
his capacity as STATE TREASURER OF
MICHIGAN, THE MICHIGAN DEPARTMENT OF
TREASURY,

Defendants-Petitioners,

PURE RESOURCES, L.P., A Texas limited
partnership, DOMINION RESERVES, INC., a
Virginia Corporation, WOLVERINE GAS & OIL
COMPANY, INC., a Michigan Corporation, WARD
HEIRS BEING: EUGENIE R. ANDERSON,
STEPHEN WARD DEVINE, ELIZABETH
PALMER DEVINE WISEMAN, MICHAEL
EDMUND DEVINE, SUZANNE LEE DEVINE,
WILLIAM W. DUNN, DAVID W. FAY, EDWIN R.
FAY, PETER W. FAY, ROBERT A. FAY,
ROSAMOND S. FISHER, FREDERICK T.
GOLDING, successor trustee under the Virginia W.
Golding Trust Agreement dated August 30, 1989,
NANCY HAMILTON, LISA MARRIOTT JONES,
DAPHNE FAY LANDRY, GEORGE S. LEISURE,
JR., PETER R. LEISURE, FLORA NINELLES, aka
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STRONG III, ROBERT A.W. STRONG, Revocable
Trust u/a/d 4/17/02 , EUGENIE S. KAUFFMAN,
THEIR HEIRS AND ASSIGNS,

Defendants-Respondents,

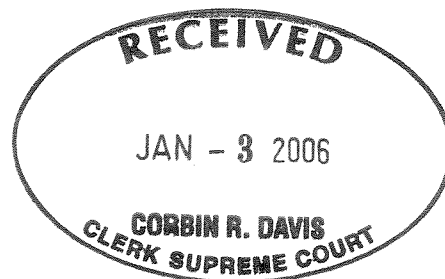
Supreme Court No. 127212

Court of Appeals No. 248963

Lower Court Case No. 02-7860-PS

36

**BRIEF OF *AMICUS CURIAE* STATE
BAR OF MICHIGAN'S
REAL PROPERTY LAW SECTION
IN SUPPORT OF
DEFENDANTS-PETITIONERS
STATE OF MICHIGAN, AND
MICHIGAN DEPARTMENT OF
TREASURY**



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**BRIEF OF *AMICUS CURIAE* STATE BAR OF MICHIGAN'S
REAL PROPERTY LAW SECTION IN SUPPORT OF
DEFENDANTS-PETITIONERS STATE OF MICHIGAN, AND MICHIGAN
DEPARTMENT OF TREASURY**

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The
COUNCIL OF THE STATE BAR OF MICHIGAN'S
REAL PROPERTY LAW SECTION
respectfully submits the following position on:

*

Comben v. State et al.

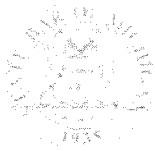
*

The Real Property Law Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Council of the Real Property Law Section only and is not the position of the State Bar of Michigan. To date, the State Bar of Michigan does not have a position on this matter.

The total membership for the Real Property Law Section is approximately 3,400.

The position was adopted by a unanimous vote of the Council of the Real Property Law Section after discussion at a Council meeting on December 14, 2005, held in conformance with the Section's bylaws. The number of members in the decision-making body is 16.



Report on Public Policy Position

Name of Section:

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Amicus curiae brief in the Matter of Comben v State et al.

Date position was adopted:

December 14, 2005

Process used to take the ideological position:

Discussion at Council meeting on December 14, 2005

Number of members in the decision-making body:

16

Number who voted in favor and opposed to the position:

15 in favor

0 opposed

1 member absent

FOR SECTIONS ONLY:

- ✓ This subject matter of this position is within the jurisdiction of the section.
- ✓ The position was adopted in accordance with the Section's bylaws.
- ✓ The requirements of SBM Bylaw Article VIII have been satisfied.

If the boxes above are checked, SBM will notify the Section when this notice is received, at which time the Section may advocate the position.

Position:

The Council respectfully requests that the Court hold that a tax foreclosure proceeding under the General Property Tax Act against a surface property estate extinguishes the interests of an owner or lessee of the estate's oil and gas rights.

There is no other specific legislation, court rule, or administrative regulation that is the subject of or referenced in this report.

BASIS OF JURISDICTION

.....

This Court has jurisdiction over this matter pursuant to MCR 7.301(a)(2) and the Court's Order of October 27, 2005, granting Defendant-Petitioner's Application for Leave to Appeal. *Comben v State*, 474 Mich 893; 705 NW2d 109 (2005). The parties appeal from an Opinion of the Michigan Court of Appeals dated August 31, 2004. *Comben v State*, 263 Mich App 474; 688 NW2d 840 (2004).

STATEMENT OF RELIEF SOUGHT

The Council of the State Bar of Michigan's Real Property Law Section (the "Council") files this *amicus* brief pursuant to the Court's invitation in its October 27, 2005 Order granting the Application for Leave to Appeal. The Council respectfully requests that this Court reverse the decisions of the trial court and the Court of Appeals, and declare that completed tax foreclosure proceedings under the General Property Tax Act ("GPTA"), 1893 PA 206, MCL 211.1 *et seq.*, extinguish not only the surface estate, but also the interests of an owner or lessee of the estate's oil and gas rights.

QUESTION PRESENTED FOR REVIEW

1. Whether the interests of an owner or lessee of oil and gas rights can be extinguished by a tax foreclosure proceeding under the GPTA against the surface property estate.

The trial court answered: No.

The Court of Appeals answered: No.

The Real Property Law Section Council answers: Yes.

Authority: MCL 211.78k(5)(e) (on completion of a tax foreclosure proceeding, “all existing recorded and unrecorded interests in that property are extinguished,” with certain, enumerated exceptions that do not apply to oil and gas rights) (emphasis added); *Thompson v Auditor General*, 261 Mich 624, 652; 247 NW 360 (1933) (tax foreclosure proceedings are “*in rem*, against the land itself”); *Int’l Typographical Union v Macomb County*, 306 Mich 562, 575-576; 11 NW2d 242 (1943) (“a proceeding *in rem*, is essentially a proceeding to determine the right in specific property against all the world, equally binding on everyone. It is a proceeding that takes no cognizance of the owner or person with a beneficial interest but is against the thing or property itself, directly, and has for its object the disposition of the property, without reference to the title of individual claimants.”) (quotation omitted, underlined emphasis added).

STATEMENT OF FACTS AND PROCEEDINGS

The facts most pertinent to the issue presented in this *amicus* brief are summarized as follows:

The Nature of the Dispute

On April 3, 2001, the County filed a petition for foreclosure against 134 parcels in Antrim County, 109 of which were located in the Lakes of the North Development. This development is underlain by producing oil and gas fields that have been severed from the surface estates. Accordingly, the owners of the oil and gas interests differ from the owners of the surface estates. On March 1, 2002, the circuit court entered a final judgment on the petition, and pursuant to the statute, fee simple absolute title to the foreclosed property vested in the county as the foreclosing governmental unit.

The principal question presented for this Court's resolution is whether a judgment of foreclosure vesting a fee simple absolute title in the foreclosing governmental unit includes the oil and gas rights that are held by parties who are not owners of the foreclosed surface estates.

The Trial Court Opinion

The trial court granted summary disposition under MCR 2.116(C)(8) and (10) in its Opinion and Order dated May 10, 2003. Purportedly relying on the specific language of the Severance Tax Act, the principles of the Dormant Minerals Act, and the common law nature of oil and gas, the court held that the "legislature has enacted a separate and distinct scheme for the taxation of oil and gas and has declared oil and gas exempt for all other taxes" and therefore the GPTA does not extinguish severed oil and gas interests. (Trial Ct Op at 26.)

The Court of Appeals Opinion

The Court of Appeals affirmed the trial court's decision, holding that oil and gas rights are exempt from ad valorem tax and are therefore unaffected by foreclosure proceedings involving the surface estate. *Comben v State*, 263 Mich App 474, 479; 688 NW2d 840 (2005). The Court of Appeals' reasoning was based on the tax treatment accorded to oil and gas under the Severance Tax Act, MCL 205.301, *et seq.* *Id.* at 483; 688 NW2d 840. The Court of Appeals also found support in the Dormant Minerals Act, MCL 554.291, *et seq.*, which requires the owner of severed oil and gas interests to take certain steps every twenty years in order to avoid forfeiture of the oil and gas interests to the surface owner. *Id.*; 688 NW2d 840. The Court of Appeals reasoned:

if the general provision for extinguishing “all existing recorded and unrecorded interests in that property” of § 78k(5)(e) of the GPTA were meant to override the specific avenues for preserving severed oil and gas interests set forth in §§ 1 and 2 of the [D]ormant [M]ineral [A]ct, the Legislature would have included a statement to that effect within the GPTA or revised [the Dormant Minerals Act] accordingly.

Id. at 484; 688 NW2d 840. The Court of Appeals so held even while acknowledging that the Legislature set forth specific exemptions in MCL 211.78k(5)(e) that do not include oil and gas interests. *Id.* at 481; 688 NW2d 840. The State now appeals.

STANDARD OF REVIEW

This Court reviews the grant or denial of summary disposition *de novo*, as well as questions involving statutory interpretation. *Bingham Twp v RLTD R Co*, 463 Mich 634, 641; 624 NW2d 725 (2001).

ARGUMENT

I. SECTION 211.78k(5)(e) OF THE GPTA EXPRESSLY EXTINGUISHES “ALL” INTERESTS IN AN ESTATE THAT HAS BEEN FORECLOSED FOR THE NONPAYMENT OF TAXES. THERE IS NO EXCEPTION FOR SEPARATELY HELD OIL AND GAS RIGHTS, AND THE SEVERANCE TAX ACT AND DORMANT MINERALS ACT DO NOT CREATE SUCH AN EXCEPTION.

A. The Plain Language of Section 211.78k(5)(e) is Consistent with Nearly a Century of Michigan Statutory and Common Law.

The State exhaustively demonstrates in its merits brief that as a matter of both statutory and common law, oil and gas rights in Michigan have always been (1) assessed as part of the surface estate, and (2) foreclosed along with the surface estate when the surface owner fails to pay property taxes. (State’s Br at 20-27.) This history is continued in the plain language of GPTA Section 211.78k(5)(e), which is controlling. *See People v Herron*, 464 Mich 593, 611; 628 NW2d 528 (2001) (where statutory language is unambiguous, Michigan courts presume the Legislature intended the meaning clearly expressed in the statute).¹

Section 211.78k(5)(e) plainly provides that “all” interests in a foreclosed property are extinguished, with only three categorical exceptions, none of which is relevant here:

¹ The GPTA subjects all real and personal property within the State of Michigan to taxation unless the property is expressly exempt. MCL 211.1. The GPTA defines real property as all land within Michigan, including all buildings and fixtures on the land and all appurtenances to the land. MCL 211.2(a). The words “‘land,’ ‘lands,’ ‘real estate’ and ‘real property’ means lands, tenements and real estate, and all rights thereto and interests therein.” MCL 8.3i. Thus, severed oil and gas interests are included within the definition of real property. This is reiterated by the method of assessing property under the GPTA. For purposes of determining assessed value for which ad valorem tax is levied, all estates in land, including severed mining interests, must be assessed together. *Curry v Lake Superior Iron Co*, 190 Mich 445, 448; 157 NW 19 (1916). In *Curry*, this court noted that it must be presumed that the assessing officer, in obedience to the statutory mandate, includes the value of the severed mineral interests in the assessment of the surface owner’s estate. *Id.* at 449; 157 NW 19. Furthermore, the GPTA allows separate assessments for metallic resources; if the legislature intended a separate assessment for mineral interests such as oil and gas it would have expressly provided for in the GPTA. MCL 211.6b.

The circuit court shall enter final judgment on a petition for foreclosure . . . [that] shall specify all of the following:

(e) That all existing recorded and unrecorded interests in that property are extinguished, except [1] a visible or recorded easement or right-of-way, [2] private deed restrictions, or [3] restrictions or other governmental interests imposed pursuant to the [NREPA]

MCL 211.78k(5)(e) (emphasis added). If the Legislature had intended to create a fourth exception for separately held oil and gas rights it could have done so. Since the Legislature did not, it is impermissible to write such an exception into the statute. *Expressio unius est exclusio alterius*.

The Court of Appeals acknowledged that the “words ‘all existing recorded and unrecorded interests in that property’ seem to embrace every conceivable property interest.” *Comben*, 263 Mich App at 480; 688 NW2d 840. The Court of Appeals also acknowledged that “the setting forth of a few specific exceptions that do not include severed gas or oil rights implies that the latter are not exempt.” *Id.* at 481-482; 688 NW2d 840. But, rather than following the statute’s plain language, the Court of Appeals instead looked to the Severance Tax Act and the Dormant Minerals Act. As will be explained, these statutes do not affect real property taxes and are therefore irrelevant to whether Section 211.78k(5)(e) forecloses separately held oil and gas rights in addition to the surface estate.²

² The Court of Appeals’ holding is also blatantly inconsistent with its interpretive approach in *Saginaw General Hospital v City of Saginaw*, 208 Mich App 595; 528 NW2d 805 (1995). There, the Court of Appeals was asked to determine whether a childcare exception existed to GPTA Section 211.7r’s exemption for nonprofit real property, where the statute enumerated only non-childcare exceptions. The Court of Appeals refused to create additional exclusions, instead reiterating its duty to “faithfully apply the statutory test.” *Id.* at 601; 528 NW2d 805.

B. The Severance Tax Act Applies Only to Minerals that Have Been “Severed” From the Real Property. By Definition, the Act is Irrelevant to the Payment of Real Property Taxes.

As the State correctly explains in its brief, the Severance Tax Act does not exempt private oil and gas rights from taxation under the GPTA. (State Br at 28-40.) Rather, the Act levies a tax “upon each producer engaged in the business of severing from the soil, oil or gas” MCL 205.301; *see Lawnichak v Dep’t of Treasury*, 214 Mich App 618, 623; 543 NW2d 359 (1995) (the Act imposes a specific tax, not a property tax, on oil and gas producers). In other words, the severance tax is a production tax and is only applicable when the oil and gas interests are actually produced, i.e., withdrawn from the land and converted into UCC Article II goods that can be transported and sold in the market.³ In fact, the definition of “oil” as used in the Severance Tax Act means “petroleum oil, mineral oil, or other oil *taken from the earth*.” MCL 205.311(1) (emphasis added). Conversely, to the extent oil and gas have not been severed from the real estate, the Severance Tax Act is not applicable and can have no effect on ad valorem real property taxes (as opposed to ad valorem personal property taxes). (State’s Br at 20-27.) This fact strips the Severance Tax Act of all relevance to this dispute, because the Act does not purport to affect real property taxes. *See Continental Motors Corp v Muskegon Twp*, 376 Mich 170; 135 NW2d 908 (1965) (tax on personalty is an excise tax, not a property tax).

³ When severance tax is levied upon the production of oil and gas, it is “in lieu of all other taxes, state or local, upon the oil and gas. . . .” MCL 205.315. It is clear from the case law pertaining to the applicability of the Severance Tax Act, specifically section 15, that the goal is to avoid double taxation. *See, e.g., Bauer v Dep’t of Treasury*, 203 Mich App 97; 512 NW2d 42 (1993) (an individual who pays severance tax on royalty interests is exempt from also paying income tax on those royalties); *Cowen v Dep’t of Treasury*, 204 Mich App 428; 516 NW2d 511 (1994) (an individual who pays severance tax is exempt from the single business tax).

C. The Dormant Minerals Act Is Also Irrelevant to the Payment of Taxes.

An analysis of the Dormant Minerals Act demonstrates it is likewise irrelevant to the question presented. The Court of Appeals reasoned that the Dormant Minerals Act was a specific statutory provision meant to preserve the severed interests of oil and gas owners, and that the GPTA was a general provision for extinguishing “all recorded and unrecorded interests in that property.” *Comben*, 263 Mich App at 484; 688 NW2d 840. Reasoning that specific statutory provisions control when they differ from related general provisions, the court erroneously held that the avenues for preserving severed oil and gas interests set forth in the Dormant Minerals Act override the GPTA. *Id.*; 688 NW2d 840.

In so holding, the Court of Appeals analyzed the issue exactly backwards. It is a well-established principle of judicial construction that “[w]hen two statutes relate to the same subject or share a common purpose, they are *in pari materia* and must be read together as one law, even if they make no reference to one another and were enacted on different dates.” *Michigan Coalition of Responsible Gun Owners v City of Ferndale*, 256 Mich App 401, 416; 662 NW2d 864 (2003) (emphasis added) (citing *Jackson Cnty Coll v Dep’t of Treasury*, 241 Mich App 673, 681; 621 NW2d 707 (2000)). Here, the purpose of the Dormant Minerals Act is to encourage oil and gas exploration and development in Michigan by reducing the difficulty of locating the mineral rights owner (State’s Br at 41-42), while the purpose of the GPTA is to provide for the prompt payment of real property taxes. There is nothing inconsistent or conflicting in these two statutes, nor is one more “general” or “specific” than the other. Reading the statutes together and attempting to give meaning to both, it is clear that while the Legislature generally requires mineral owners to take nominal action to ensure their rights do not “expire,” mineral owners must also ensure the prompt payment of taxes to prevent their rights from being

“extinguished.” There is no principle of statutory construction or imputed legislative purpose that suggests the Dormant Minerals Act somehow undercuts an entire category of real property interests that would otherwise be included in Section 211.78k(5)(e)’s plain language.

D. This Court Should Reject Respondents’ Request for a Judicially Created Exception to the Foreclosure Statute.

Respondents have argued that if the plain language of GPTA Section 211.78k(5)(e) is accepted at face value, persons separately holding oil and gas interests stand to lose property of great value simply because a third party fails to pay property taxes. *Comben*, 263 Mich App at 483; 688 NW2d 840. This is a misguided argument that this Court should reject.

To begin, there is nothing unfair about requiring the holder of an oil or gas interest to pay delinquent property taxes in order to maintain that mineral interest. In fact, lenders holding a mortgage on real property are regularly faced with this situation when a mortgagor fails to pay taxes, thus placing the property (collateral) at risk of default. No one contends that it is unfair that a lender must pay a “third party’s” delinquent taxes to maintain its interest in the property, and yet the same situation is presented here. Moreover, just as the lender has a right of reimbursement against the mortgagor for the payment of delinquent taxes, so does the holder of an oil or gas interest have a right of reimbursement against the surface owner. Unless this Court is prepared to carve out an “unfairness” exception for all persons and entities that must rely on a third party to pay property taxes, there is nothing unique about oil and gas interests that would justify such an exception here.

In addition, Respondents’ position results in a peculiar incongruity. As noted in the Court of Appeals opinion, Respondents “concede that oil and gas rights that are not [separated] from the surface estate vest in the state along with the surface estate upon tax

foreclosure.” *Comben*, 263 Mich App at 479; 688 NW2d 840. Thus, according to Respondents, there is a different outcome depending on whether an estate’s oil and gas rights are held by the surface owner or a separate owner, a result that makes no sense if the analysis turns on the Severance Tax Act or the Dormant Minerals Act, as Respondents contend.

Most fundamentally, Respondents are asking this Court to act as a “Super Legislature,” writing an exception into the foreclosure statute where one does not exist. This request is violative of the Michigan Constitution’s strict separation of powers, which imbues the judiciary with the power to interpret the law, not to create it. *See, e.g., Mayor of the City of Lansing v Mich Pub Serv Comm’n*, 470 Mich 154, 161; 680 NW2d 840 (2004) (“[The Court’s] task, under the Constitution, is the important, but yet limited, duty to read into and interpret what the Legislature has actually made the law.”) (citation omitted); *Glancy v Roseville*, 457 Mich 580, 590; 577 NW2d 897 (1998) (“The responsibilities for drawing lines in a society as complex as ours—of identifying priorities, weighing the relevant considerations and choosing between competing alternatives—is the Legislature’s, not the judiciary’s.”) (quotation omitted). And that strict separation is particularly crucial here, where the Court is asked to preemptively establish a judicial exception to tax foreclosure proceedings that changes statutory language and reduces the incentive to pay property taxes at a time when such revenues are sorely needed. For all of these reasons, Respondents’ argument should be rejected.

II. THE DEBATE REGARDING WHETHER MINERAL INTERESTS ARE SUBJECT TO AD VALOREM PROPERTY TAX OR ARE OTHERWISE INCLUDED IN ASSESSED VALUE IS ULTIMATELY OF ONLY ACADEMIC INTEREST, BECAUSE TAX FORECLOSURE PROCEEDINGS ARE *IN REM*.

In the Court of Appeals, Appellee Antrim County’s primary argument was that oil and gas interests are not part of a surface estate’s assessed value and therefore not subject to foreclosure. (Antrim County Br at 16-31.) The Real Property Law Section believes that this

conclusion is incorrect, as the State explains in its merits brief. (State’s Br at 20-27.) But the debate is ultimately of only academic interest, because tax foreclosure proceedings are *in rem*, against the land itself. *Thompson v Auditor General*, 261 Mich 624, 652; 247 NW 360 (1933) (“Under the tax law, the state acquires a lien against the real estate assessed, and, before such land may be sold, such lien must be foreclosed and sale ordered by the court. Such foreclosure is a proceeding *in rem*, against the land itself”); *Detroit v 19675 Hasse*, 258 Mich App 438, 448-449; 671 NW2d 150 (2003) (Michigan courts have consistently described tax foreclosure proceedings as *in rem*) (collecting cases); *see generally* MCL 211.78h (describing procedures for filing a tax foreclosure petition).

As this Court has explained, an *in rem* proceeding is an adjudication made against the property, and it binds all who have an interest in it:

[A] proceeding *in rem*, is essentially a proceeding to determine the right in specific property against all the world, equally binding on everyone. It is a proceeding that takes no cognizance of the owner or person with a beneficial interest but is against the thing or property itself, directly, and has for its object the disposition of the property, without reference to the title of individual claimants. The action of the court is binding, even in the absence of any personal notice to the party interested. Proceedings *in rem* include . . . *suits for assessments*.

Int’l Typographical Union v Macomb County, 306 Mich 562, 575-576; 11 NW2d 242 (1943) (quotation omitted, underlined emphasis added). “The distinguishing characteristic of an action *in rem* is its local rather than transitory nature, and its power to adjudicate the rights of all persons in the thing.” 1A CJS, Actions, § 69, pp 463-463 (emphasis added).

Given the nature of an *in rem* proceeding, it is irrelevant whether oil and gas interests are included in a surface estate’s assessed value. For that matter, it is irrelevant whether oil and gas are separately taxed under the Severance Tax Act or whether they are subject to

alternative methods of forfeiture under the Dormant Minerals Act. The objective of a tax foreclosure proceeding is disposition of the property itself, without regard to the individual interests of a holder in the estate's mineral rights.

By definition then, a tax foreclosure proceeding must operate to extinguish all recorded and unrecorded interests in the estate, including all oil, gas, and other mineral rights, because the proceeding is *in rem*. This characteristic of tax foreclosure proceedings is consistent with the plain language of MCL 211.78k(5)(e) ("all existing recorded and unrecorded interests in that property are extinguished"), and it provides a separate and independent reason to reverse the Court of Appeals' decision.

CONCLUSION

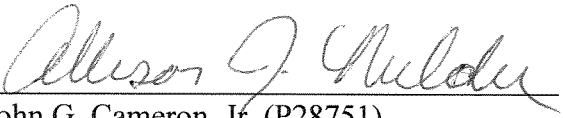
Reasonable persons could have a healthy debate regarding the "fairness" of extinguishing the interests of a mineral rights holder when the surface holder fails to pay property taxes, or even regarding the administrative inconvenience imposed on the foreclosing governmental unit if notice must be given to all known holders of mineral rights.⁴ Ultimately, however, these are policy questions for the Legislature to decide, and the Legislature has resolved them by enacting an unambiguous foreclosure scheme that ensures the maximum payment of taxes consistent with Due Process. This Court should reject Respondents' attempts to rewrite the plain language of Section 211.78k(5)(e) and convert *in rem* property foreclosure proceedings into *in personam* actions for the nonpayment of taxes. The Court of Appeals' decision should be reversed.

⁴ For the reasons set forth by the State, the Real Property Law Section agrees that "owners of severed oil and gas rights, like other owners of property interests in forfeited property, are entitled to notice under § 78i. [MCL 211.78i]." (State's Br at 43-46.)

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Respectfully submitted,

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